Johnny IP v Gaudio
2009 NY Slip Op 30770(U)
March 31, 2009
Supreme Court, Nassau County
Docket Number: 14648/08
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 23

_____X

JOHNNY IP and PENNY IP,

Plaintiffs,

-against-

SAL GAUDIO and STELLA GAUDIO,

Defendant.

_____X

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Motion Sequence...01
Motion Date...01/28/09
XXX

Papers Submitted:
Notice of Motion.....x
Affirmation In Opposition.....x
Memorandum of Law.....x
Reply Affirmation..... x

Upon the foregoing papers, the motion by the Defendant, Sal Gaudio[1] to dismiss the complaint pursuant to CPLR 3211(a)(5), (a)(7) and (a)(1) is **GRANTED** and the complaint is hereby dismissed.

This action, sounding in private nuisance, arises from the Defendant's construction of a home located at 30A Shelter Rock Road, Village of North Hills, in

[1] Based upon the deed submitted in support of the Defendants' motion, plaintiffs have agreed to discontinue the action against Stella Gaudio without prejudice.

connection with a two lot subdivision of property (referred to as lots "A" and "B"). The Plaintiffs, adjoining homeowners, residing at 2 Boxwood Way, North Hills, contend that the construction fails to comply with the Village of North Hills Zoning Code.

A prior Article 78 proceeding brought by the Plaintiffs herein against the the Defendants and the Village of North Hills was dismissed as being barred by the statute of limitations [CPLR 217(1) and 3211(a)(5)] by order of the Hon. Roy S. Mahon entered on December 10, 2007. In this action, as they did in the Article 78 proceeding, the Plaintiffs allege that from their rear yard perspective, the home at issue "appears to loom onto and fall into [Plaintiffs'] backyard." According to the Plaintiffs, the placement and orientation of the home and rear yard on lot "A" constitutes a nuisance in that it is allegedly too close to the property line and does not conform with the Village's rear yard set back regulations.[2] As a consequence of the home's placement on the lot, the Plaintiffs maintain they have suffered a loss of privacy as well as use and enjoyment of their backyard–all of which has contributed to a diminution in the value of their home.

Because of its long and narrow configuration, the Defendant's property was partitioned to create two tandem lots (lot "A" and "B") which share a common driveway. The proposed lots apparently complied with zoning regulations when presented to the Zoning

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[2]In a letter to the Village of North Hills dated July 27, 2007, the Plaintiffs' attorney sets forth his clients' position that, in accordance with Zoning Code § 215-3(B), "the front of Lot A must be considered that face of the building which faces the common driveway. * * * the rear yard of Lot A is that portion of the property adjacent to Mr. Ip's home. The actual rear face of the building on Lot A is only 25 feet from Mr. Ip's property line in violation of the North Hills Zoning Code."

Board for approval except that lot "B" (a property not at issue herein) required variances with respect to street frontage and lot width.

The Defendant seeks dismissal of the complaint predicated on the grounds that the complaint fails to state a cause of action for nuisance and is barred by laches, res judicata and collateral estoppel, as well as the documentary evidence, which the Defendant contends establishes that the house situated on lot "A" was constructed pursuant to properly issued permits and approvals.

In considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*Dinerman v Jewish Bd. of Family & Children's Services, Inc.*, 55 AD3d 530 [2nd Dept. 2008]), and the Plaintiffs afforded the benefit of every possible favorable inference. *Martin v New York Hosp. Medical Center of Queens*, 34 AD3d 650 [2nd Dept. 2006]. Even accepting the allegations of the complaint as true, as the court must on a CPLR 3211 dismissal motion, the facts at bar do not sustain a cause of action for private nuisance. Where, as here, the court considers extrinsic evidence, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed true and accorded every favorable inference. *M & B Joint Ventures, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 260 [1st Dept. 2008]; *Salvatore v Kumar*, 45 AD3d 560, 563 [2nd Dept. 2007]. Where extrinsic evidence is used, the standard of review on a CPLR 3211(a)(7) motion is whether plaintiffs have a cause of action, not whether they have stated one. *Guggenheimer v*

Ginzburg, 43 NY2d 268, 275 [1977]. None of the Plaintiffs' submissions in opposition to the dismissal motion rehabilitate the conclusory allegations of the complaint which are flatly contradicted by the record.

To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with the use or enjoyment of land, substantial in nature, intentional or negligent in origin, unreasonable in character and caused by the defendant's conduct. *Anderson v Elliott*, 24 AD3d 400, 402 [2nd Dept. 2005]. In the Court's view, the fact that there is 25 feet between the property line and the structure constructed on lot "A"–or put another way–the fact that there is a total of 75 feet between the Plaintiffs' house and the building constructed on lot "A"does not rise to the level of substantial interference with the Plaintiffs' use and enjoyment of their property so as to constitute private nuisance.

In order to be viable, the interference complained of in a nuisance claim must not be "fanciful, slight, or theoretical but certain, substantial, and must interfere with the physical comfort of the ordinarily reasonable person." 81 N.Y. Jur2d Nuisances, § 16 at p. 332; *Dugway, Ltd. v Fizzinoglia*, 166 AD2d 836, 837 [3rd Dept. 1990], *appeal withdrawn* 77 NY2d 902 [1991]. Or put another way, the use of the property "must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient." *Campbell v Seaman*, 63 NY 568, 577 [1876]. The facts at bar simply do not support a cause of action for nuisance.

While the Plaintiffs agree that the instant motion stems from the same set of

facts and circumstances as those which gave rise to the Article 78 petition, they claim that the issues and claims are different and unrelated and that the Article 78 proceeding was dismissed solely on procedural grounds. They do not, however, deny the Defendant's assertion that the Village of North Hills' Building Superintendent's determination regarding the front yard of the structure built on lot "A" was fully addressed by both parties in a hearing before the Hon. Roy A. Mahon, who in his December 10, 2007 decision, found that:

> [a] review of the respective submissions establishes that the issue of the set back was properly determined by the Respondent Village of North Hills' Superintendent to be front yard footage which was codified in the North Hills' Board of Appeals June 10, 2003 determination which was filed in the North Hills' Clerk's Office on August 19, 2003."

Review of the petition reveals that the decisive issue in both this action and the Article 78 proceeding is the adjoining homeowners' objection to the placement and orientation of the building on lot "A" and, in particular, the Plaintiffs' assertion that the south side of lot "A" i.e., the side adjacent to the Plaintiffs' property was improperly designated a side rather than rear yard in violation of the Zoning Code.

The record establishes that the house on lot "A" was constructed pursuant to properly issued permits and approvals. Although smaller than lot "B", lot "A" is an oversized lot, in conformity with Code requirements and no variances, *vis a vis* construction of the residence thereon, were necessary. Moreover, it is undisputed that Article 11, § 215-3(B) defines "front yard" and "front of structure" respectively as:

> "[a] yard extending across the full width of the lot and lying

> between the front property line and the nearest line of the building."
>
> "[t]he face parallel to the road or drive and which contains the main access to the building.

Importantly, the Code further states

> **"[i]f the main entrance is not located in such face, the Code Enforcement Officer may designate which face of the structure is the front."**

This is precisely the situation at bar where the Building Superintendent, well within his authority, designated the easterly yard that abuts Shelter Rock Road as the front yard even though the main entrance faces the common driveway on the northerly side of lot "A".

The placement and orientation of the single family residence on lot "A", in conformity with applicable zoning regulations, is an insufficient predicate for a nuisance claim as the record is devoid of any basis on which the Plaintiffs might claim a real and appreciable, not petty or imagined, interference with their use and enjoyment of their property. As the Defendant contends, the Plaintiffs have failed to allege any manner in which a fully conforming structure which is seventy-five feet from the closest part of their home, substantially interferes with their use and enjoyment of their property.

Given that the facts do not support an actionable cause of action for private nuisance, the complaint is hereby dismissed pursuant to CPLR 3211(a)(7).

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
March 31, 2009

Hon. Randy Sue Marber, J.S.C.
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